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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WENDELL JAMES TYREE,

Defendant and Appellant.

A134212

(City & County of San Francisco
Super. Ct. No. 214864)

A jury convicted Wendell James Tyree of inflicting corporal injury resulting in a traumatic condition on a former cohabitant (Pen. Code, § 273.5, subd. (a)),¹ assault with force likely to cause great bodily injury (§ 245, subd. (a)(1)), and resisting arrest (§ 148, subd. (a)(1)). The jury acquitted defendant of assault with intent to commit oral copulation (§ 220, subd. (b)) and a second corporal injury charge (§ 273.5, subd. (a)). The jury deadlocked on a rape charge (§ 261, subd. (a)(2)), which was later dismissed. The court found that defendant has two prior convictions for attempted robbery and sentenced him to prison under the three strikes law for 25 years to life. (§§ 1170.12, subd. (b)(1), 1192.7, subds. (c)(19), (c)(39).) The court also imposed various fines, including a domestic violence fine. (§ 1203.097, subd. (a)(5).)

Defendant contends there is insufficient evidence to support his corporal injury conviction because the victim did not suffer a “traumatic condition” within the meaning of the statute. (§ 273.5, subd. (a).) Defendant also contends the court erred in imposing a

¹ All further section references are to the Penal Code.

domestic violence fine because only those granted probation are subject to the fine. (§ 1203.097, subd. (a)(5).) The Attorney General concedes the second point. We shall strike the fine but affirm the judgment in all other respects.

Statement of Facts

Bridgett V. testified that she and defendant dated for several years and then lived together for about a year until late 2009, when she ended the romantic relationship. Bridgett testified that in 2011 she and defendant were only friends, although defendant testified at the October 2011 trial that their romantic relationship continued “all the way up until the present off and on.”

On February 7, 2011, defendant and Bridgett had an altercation on the street.² Bridgett testified that defendant demanded entry into her house to wash his shoes and grew angry when she refused. Defendant told Bridgett: “I could just strangle you and choke you out.” Bridgett pushed defendant, defendant grabbed her, and the two fell to the ground. Bridgett called the police, who arrived to find her crying with a bruised arm and a scratch on her nose. Defendant could not be located.

Bridgett testified that defendant came to her house a week later, on February 14, 2011, and asked to “let him come back” to live with her. Bridgett said she did not want anything to do with him and texted her daughter on the telephone, asking her to call the police. Defendant grabbed Bridgett by the neck from behind, threw her on the couch, and choked her. Defendant threatened to “choke [her] to death” and pressed so hard on her neck that she could not breathe. Defendant demanded she let him come back and she agreed so he would release her. Defendant stopped choking her and pulled her upstairs. Defendant forced Bridgett to have intercourse with him. Defendant also demanded she orally copulate him but no copulation occurred. Defendant dressed and Bridgett went downstairs.

² The jury acquitted defendant of the domestic violence charge associated with this incident.

Bridgett's daughter meanwhile called the police. The police arrived and twice ordered defendant to place his hands behind his head. Defendant did not comply and reached for his waistband. A police officer grabbed defendant's left arm and placed a handcuff on his wrist. Defendant tensed his body and resisted the officer's effort to cuff the other wrist. It took about five officers to force defendant's arms behind his back for handcuffing.

At the police station, defendant admitted that he "squeezed" Bridgett's neck. When asked "how hard," defendant replied: "Hard enough. Put it like this, I squeezed hard enough to keep her . . . from yelling at me." At trial, defendant denied the assault. He said he was invited to the house and had consensual sex with Bridgett. Defendant said a verbal fight later arose during which Bridgett punched him and he pushed her away. He denied choking her and said he confessed squeezing her neck because he was "mentally overwhelmed" when interviewed by the police.

A nurse at a rape treatment center examined Bridgett after the incident. Bridgett had red marks under both eyes, a scratch on her face, and a limited range of motion in her neck. Bridgett's neck was "a little red." The nurse did not see bruising or swelling, but the nurse testified that she saw Bridgett "two hours after the assault and lots of times bruising and swelling will show up hours later, sometimes even a day or two later." Bridgett told the nurse that her throat and neck "were really hurting her" and the nurse saw that Bridgett "was drooling a little bit because she couldn't swallow, her throat was so sore." The nurse explained that "we normally swallow the saliva produced in our mouth, but when you have a really sore throat as she did, it [is] very difficult to swallow."

Bridgett testified that her neck was stiff for about a week and her throat hurt for months after the assault. She said it felt like she had her tonsils removed. It hurt to swallow water and she could not eat anything solid for weeks. Bridgett said she continued to feel "some pain" for three to four months.

Discussion

I. *Substantial evidence supports the conviction for inflicting corporal injury.*

Defendant contends there is insufficient evidence to support his conviction for inflicting corporal injury resulting in a traumatic condition on a former cohabitant because Bridgett did not suffer a “traumatic condition” within the meaning of the statute. Section 273.5, subdivision (a) provides, in pertinent part, that “Any person who willfully inflicts upon a person who is his . . . cohabitant [or] former cohabitant . . . corporal injury resulting in a traumatic condition is guilty of a felony.” At the time relevant here, “traumatic condition” was defined as “a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.” (Former § 273.5, subd. (c).)³

A lesser degree of harm satisfies section 273.5’s “traumatic condition” standard than would satisfy standards in other criminal provisions, such as felony battery that requires “serious bodily injury.” (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.) “[T]he Legislature has clothed persons . . . in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed.” (*Ibid.*) Section 273.5 does require *some* physical injury, which differentiates it from lesser offenses like simple battery. (*Ibid.*) The injury, however, may be minor. (*Ibid.*)

In *People v. Wilkins* (1993) 14 Cal.App.4th 761, 771, the court found reasonable cause to arrest defendant for inflicting corporal injury resulting in a traumatic condition where defendant hit his wife “a few times in the face,” resulting in “redness about her face” and a sore neck and nose. Sufficient evidence of a traumatic condition was found in *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085-1086 where a woman sustained “large bruises on her arms, legs, and back” from being struck with a rod used to operate window blinds. In *People v. Abrego* (1993) 21 Cal.App.4th 133, 136-137 and footnote 3,

³ The statute has recently been amended to specify that a “traumatic condition” includes “injury as a result of strangulation or suffocation” from “impeding the normal breathing or circulation of the blood of a person by applying pressure on the throat or neck.” (Stats. 2011, ch. 129, § 2.)

upon which defendant relies, the court found insufficient evidence of a traumatic condition where a wife reported transitory “pain and tenderness” immediately after she was punched in the face but had no bruising, never sought medical treatment and, at trial, testified “she had not been injured.”

The evidence here is sufficient to support the jury’s finding that Bridgett suffered a traumatic condition from defendant choking her. The nurse who examined Bridgett hours after the assault observed that Bridgett’s neck was red and had a limited range of motion. Bridgett told the nurse that her throat and neck “were really hurting her” and the nurse saw that “she was drooling a little bit because he couldn’t swallow, her throat was so sore.” Bridgett testified that she was impaired for weeks after the assault with difficulty eating, drinking and talking. Upon this evidence, a reasonable trier of fact could find defendant guilty of inflicting corporal injury resulting in a traumatic condition.

II. The domestic violence fine does not apply to those committed to prison and must be stricken.

The court imposed various fines, including a \$400 domestic violence fine under section 1203.097. Defendant contends, and the Attorney General agrees, that the fine applies only to probationers. “If a person is granted probation” for a crime of domestic violence, “the terms of probation shall include” a payment by the defendant that funds domestic violence counseling programs. (§ 1203.097, subd. (a)(5).) The statute is inapplicable to defendant, who was committed to prison.

Disposition

The \$400 fine imposed under Penal Code section 1203.097 is stricken. The judgment is affirmed in all other respects.

Pollak, J.

We concur:

McGuiness, P. J.

Jenkins, J.